A **SIN-KUNG LOGISTICS (KL) SDN BHD v. PROJEK LEBUHRAYA USAHASAMA BHD**

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
MOHAMAD ARIFF YUSOF JCA
B HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: B-02-515-03-2014]
2 MARCH 2015

C ***CIVIL PROCEDURE:*** *Action – Dismissal of action – Whether plaintiff had more than one cause of action – Whether judge entitled to dismiss plaintiff's suit upon determination of only one issue – Whether judge should have considered O. 33 r. 5 of Rules of Court 2012*

The plaintiff, a concession holder of express highway was authorised to collect toll from users pursuant to the Federal Roads (Private Management) D Act 1984 ('the Act'). The plaintiff claimed that the defendant's employees, while driving the defendant's vehicle, (i) had deliberately evaded from paying the toll charges; and (ii) were reckless and had damaged the toll booth and posed high risk to other road users. The plaintiff therefore claimed from the defendant, the toll charges and an injunction to restrain the defendant's E employees from using the express highway without paying the toll. The High Court Judge ('HCJ') heard the plaintiff's application under O. 32 r. 2 of the Rules of Court 2012 ('ROC') and dismissed the plaintiff's whole action. In the midst of the trial, the HCJ ordered the plaintiff to file an application under O. 33 r. 2 of the ROC for the determination of a question of law in F the light of the Court of Appeal's decision in *Projek Lebuhraya Utara Selatan v. Permas Forwarding Agency Sdn Bhd*.

Held (allowing appeal; setting aside decision of High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

G **(1)** The plaintiff had more than one cause of action and the determination of one issue before the High Court under O. 33 r. 2 of the ROC did not, in law, entitle the HCJ to dismiss the plaintiff's suit. The court should not have surreptitiously stayed the proceedings and on its own motion direct an application under O. 33 r. 2 of the ROC to be filed and dismiss the suit without considering O. 33 r. 5 of the ROC. (para 10)

H **(2)** Upon consideration of the facts of the case, the interest of public involved and the allegation of misuse of the express highway by the defendant's employees and the damage and threat complained by the plaintiff to its employees as well as other toll users, it was abhorrent to I the notion of justice and fair play to summarily dismiss the entire suit purportedly under O. 33 r. 2 of the ROC without proper judicial consideration of O. 33 r. 5 of the ROC and the pleadings. (para 11)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif, pemegang konsesi lebuhraya ekspres telah diberi kuasa untuk memungut tol daripada pengguna-pengguna menurut Akta Jalan-Jalan Persekutuan (Pengurusan Persendirian) 1984. Plaintif mendakwa bahawa pekerja defendan, semasa memandu kenderaan defendan (i) telah dengan sengaja mengelak daripada membayar caj tol; dan (ii) bertindak cuai dan telah merosakkan pondok tol dan telah menimbulkan risiko yang tinggi kepada pengguna-pengguna jalan raya yang lain. Plaintif oleh itu menuntut, daripada defendan, caj tol dan injunksi untuk menghalang pekerja-pekerja defendan daripada menggunakan lebuhraya ekspres tanpa membayar tol. Hakim Mahkamah Tinggi ('HMT') telah mendengar permohonan plaintif di bawah A. 32 k. 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan menolak keseluruhan permohonan plaintif. Semasa perbicaraan, HMT memerintahkan plaintif untuk memfailkan permohonan di bawah A. 33 k. 2 KKM bagi pemutusan persoalan undang-undang berdasarkan keputusan Mahkamah Rayuan dalam kes *Projek Lebuhraya Utara Selatan v. Permas Forwarding Agency Sdn Bhd*.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Plaintif mempunyai lebih daripada satu kausa tindakan dan pemutusan satu isu di Mahkamah Tinggi di bawah A. 33 k. 2 KKM, dari segi undang-undang, tidak memberikan hak kepada HMT untuk menolak guaman plaintif. Mahkamah tidak boleh secara diam-diam menangguhkan prosiding dan atas usulnya sendiri mengarahkan pemfailan permohonan di bawah A. 33 k. 2 KKM dan menolak guaman tersebut tanpa mempertimbangkan A. 33 k. 5 KKM.

(2) Selepas mempertimbangkan fakta kes, kepentingan awam yang berkaitan dan dakwaan penyalahgunaan lebuhraya ekspres oleh pekerja-pekerja defendan dan kerosakan serta ancaman terhadap pekerja-pekerjanya yang diadukan oleh plaintif dan juga pengguna-pengguna tol yang lain, adalah bertentangan dengan keadilan untuk menolak keseluruhan guaman di bawah A. 33 k. 2 KKM tanpa pertimbangan kehakiman yang wajar terhadap A. 33 k. 5 KKM dan pliding-pliding.

Case(s) referred to:

Ayu Damai Sdn Bhd & Anor v. Sarawak Pulp Industries Sdn Bhd & Ors [2007] 1 LNS 414 HC ***(refd)***

Projek Lebuhraya Utara-Selatan Bhd v. Permas Forwarding Agency Sdn Bhd [2014] 2 MLJ 893 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 32 r. 2, O. 33 r. 2

For the appellant - Lim Kian Leong (Sia Siew Mun, T Thirunaaukarasu & K Jegatish Kumar with him); M/s Thiru Jegatish & Assocs
For the respondents - Dinesh Praveen Nair (Ling Teck John with him); M/s Ling Teck John & Co

[Appeal from High Court, Shah Alam; Civil Suit No: MT3-22-334-2006]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's/plaintiff's appeal against the decision of the learned High Court Judge who heard the plaintiff's application under O. 32 r. 2 of Rules of Court 2012 and dismissed the whole action of the plaintiff notwithstanding the writ action could survive on other grounds, came up for hearing on 25 September 2014 and upon hearing we allowed the appeal and ordered the trial to be continued in the High Court. This is our judgment.

Brief Facts

[2] The statement of claim shows more than one cause of action. The plaintiff is a concession holder of express highway and authorised to collect toll from users, pursuant to the Federal Roads (Private Management) Act 1984 (FR 1984). The plaintiff claims:

(i) the defendant's employees driving the defendant's vehicle had deliberately evaded from paying the toll charges; and

(ii) the defendant's employees also were reckless in driving the vehicle and had damaged the toll booth and posed high risk to other road users.

[3] In consequence of the breach of the employees of the defendant, the plaintiff claims from the defendant the toll charges as well as an injunction to restrain the defendant's employees from using the express highway without paying toll.

[4] The prayer in the statement of claim reads as follows:

> The plaintiff's claims against the defendant are for:
>
> (a) The sum of RM518,369.27;
>
> (b) That the defendant whether by itself, or through its director, agent, servants, nominees or otherwise, howsoever, be restrained from using the expressways maintained by the plaintiff without paying toll;
>
> (c) Interest at the rate of 8% per annum on the sum of RM518,369.27 from the date of the filing of this action to the date of full and final settlement;

(d) Costs of this action;

(e) Such further or other orders or directions that this Honourable Court deems just, necessary or expedient.

[5] At the midst of trial, after 65 witnesses had given evidence for the plaintiff, the learned High Court Judge ordered the plaintiff to file an application under O. 33 r. 2 for the determination of a question of law in the light of the Court of Appeal's decision in *Projek Lebuhraya Utara-Selatan Bhd v. Permas Forwarding Agency Sdn Bhd* (Appeal No. N-04-332-09/2012) which is now reported in the Malayan Law Journal with citation as [2014] 2 MLJ 893.

[6] In essence, the said judgment of the Court of Appeal says that toll can only be collected from users and the highway concessionaire cannot collect toll from the vehicle owners and the common law principles of vicarious liability will not apply.

[7] What the court has not decided in that case is whether an injunction can be ordered against the defendant to restrain the defendant's employees from using the highway without payment of toll. Payment of toll is a concept which was in existence in most of the common law jurisdiction without even any statutory right to collect revenue.

[8] It is also not clear from the Court of Appeal judgment if the defendant had authorised the employees to use the express highway and if so, whether the defendant will be obliged to pay the toll charges if the employees had not paid the toll charges at common law, and whether if the court condones such non-payment will result in unjust enrichment to the defendant.

[9] We do not think it is appropriate to answer any of the questions which were posed by the learned counsel which can be raised in the suit based on the pleadings even though the issue for determination for the court as directed by the High Court and not voluntarily filed by the plaintiff relates to only one issue, namely:

> Whether an employer is vicariously liable to a concessionaire for his employee's failure to pay toll (Section 8(2) Federal Roads (Private Management) Act, 1984) when the employee uses the road in the course of his employment.

[10] We have read the appeal records and the able submissions of the parties. After much consideration to the submissions of the learned counsel for the defendant, we take the view that the appeal should be allowed and the judgment of the learned High Court Judge dismissing the plaintiff's claim *in toto* should be set aside and the trial now part heard to be ordered to proceed. Our reasons *inter alia* are as follows:

(i) the plaintiff has more than one cause of action and the determination of one issue before the High Court under O. 33 r. 2 does not in law entitle the learned High Court Judge to dismiss the suit of the plaintiff. Support

for the proposition is found in a number of cases, and has been documented by Hamid Sultan bin Abu Backer JC (as he then was) in the case of *Ayu Damai Sdn Bhd & Anor v. Sarawak Pulp Industries Sdn Bhd & Ors* [2007] 1 LNS 414, and we do not wish to repeat the same; and

(ii) the court having heard 65 witnesses and having known that the plaintiff is also seeking an injunction should not have surreptitiously stayed the proceedings and on its own motion direct an application under O. 33 r. 2 to be filed and dismiss the suit without considering O. 33 r. 5 which states:

> 5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[11] We take the view, taking into consideration the facts of the case, the interest of public involved and the allegation of misuse of the Express Highway by the defendant's employees and the damage and threat complained by the plaintiff to its employees as well as other toll users, it will be abhorrent to the notion of justice and fair play to summarily dismiss the entire suit purportedly under O. 33 r. 2 without proper judicial consideration of O. 33 r. 5, and the pleadings.

[12] For the reasons stated, the appeal was allowed. The order of the High Court was set aside. The matter was directed to proceed with trial, with no order as to costs. The deposit was ordered to be refunded.